VIA EDOCKET

October 20, 2011

OSWER Docket
EPA Docket Center, Mail Code 28221T
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Comments on Definition of Solid Waste Proposed Rule – Docket ID No. EPA–HQ–RCRA-2010-0742

Dear Sir or Madam:

The Society of Chemical Manufacturers and Affiliates (SOCMA) is pleased to offer the following comments concerning the Agency's recent proposed rule to revise the definition of solid waste under the Resource Conservation & Recovery Act (RCRA).[1]

SOCMA is the only U.S.-based trade association dedicated solely to the batch, custom and specialty chemical industry. Having represented a diverse membership of small, medium and large chemical companies since 1921, SOCMA is the leading authority on this sector. SOCMA's more than 200 member companies make the products and refine the raw materials that make our standard of living possible. Over 70% of SOCMA's active members are small businesses. In fact, 71% of our members have fewer than 100 employees. Forty-six percent of our manufacturing members report sales under $10 million, and another 35% report sales between $10-$40 million. From pharmaceuticals to cosmetics, soaps to plastics and all manner of industrial and construction products, SOCMA members make materials that save lives, make our food supply safe and abundant, and enable the manufacture of literally thousands of other products.

ChemStewards® is SOCMA's flagship environmental, health, safety and security (EHS&S) continuous performance improvement program. It was created to meet the unique needs of the batch, custom, and specialty chemical industry, and reflects the industry's commitment to reducing the environmental footprint left by members' facilities. As a mandatory requirement for SOCMA members engaged in the manufacturing or handling of synthetic and organic chemicals, ChemStewards is helping participants reach for superior EHS&S performance.

Revisions to the RCRA definition of solid waste have been a top priority for SOCMA members since the 1990s, and our record of advocacy over this period of time reflects that

[1] 76 Fed. Reg. 44094 (July 22, 2011). Subsequent cites to the proposal are parentheticals in text.

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We also revisit in the context of sustainable materials management some of the issues that SOCMA has repeatedly advocated for over the years. For example, we support the proposed retention of the "under the control of the generator" exclusion, and we particularly emphasize the importance of retaining its tolling exclusion. The tolling exclusion, we note, enables our members to make beneficial use of valuable materials that they had been destroying by incineration. EPA itself acknowledges that, with respect to tolling, "the Agency ***does not wish to unnecessarily discourage sustainable reclamation practices under these arrangements.***" SOCMA reminds EPA how important this provision is to our membership, and we highlight both (i) how nothing has changed that would warrant revisiting the exclusion and (ii) how inappropriate and unhelpful EPA's proposed alternative would be. Finally, SOCMA opposes the proposal to make the third and fourth legitimacy criteria mandatory. We demonstrate that case law does not warrant it, and we provide several concrete examples from our membership that show how this proposal, if finalized, would have the unintended effect of ending a great deal of current recycling under RCRA.

All of these positions underlie one basic argument -- SOCMA urges EPA not to undermine some of the most sustainable, and beneficial, provisions of the proposal (or the other RCRA recycling exclusions) by creating disincentives for generators to take advantage of them.

DISCUSSION

I. Threshold Considerations

At the outset, SOCMA emphasizes two considerations that apply to virtually every provision of the proposed rule and that recur in SOCMA's comments. It will be crucial for EPA to bear these considerations in mind continuously as it determines how to finalize the current proposal. They are key to both whether the final rule maximizes the purposes of the statute and whether it can be sustained in the inevitable court challenges.

A. Pivotal Role of Discard

In the 2008 final rule, EPA said it "continues to believe that the concept of discard is the most important organizing principle governing the determinations made in today's final rule."[3] EPA reiterated in 2009 that "[t]he scope of possible changes to the definition of solid waste is governed by the concept of 'discard."[4] The preamble to the latest proposal focuses instead on establishing that some materials destined for recycling can still be "discarded" and hence regulated as hazardous waste. While that may be true, it is also true that materials that are *not* discarded can *not* be regulated as hazardous waste. There is a strong case to be made that several provisions of the new proposal, including making notification a condition of the "under control of the generator" exclusion, exceed EPA's authority to regulate hazardous waste under RCRA. There is even less question that some of the options that EPA has not proposed, but on which it

[3] 73 Fed. Reg 64676 (October 30, 2008).

[4] EPA's notice announcing the June 30, 2009 public meeting to consider possible changes to the DSW rule.

What is most innovative about SMM is its frank recognition that a life-cycle analysis of materials management practices "works to ensure unintended consequences are avoided." (Id.) It is critical that EPA apply this consideration to the entirety of the current proposal, to ensure that it does not result in increased energy use, less efficient use of materials, less efficient movement of goods and services, greater use of water, or increased volume and toxicity of waste. As we note frequently below, the environmental benefits secured by provisions such as the proposed remanufacturing exclusion are likely to be offset by other provisions or suggestions in the proposal that will prevent, or serve as disincentives, to reuse and recycling. A prime example is the suggestion that the tolling exclusion be abolished. Doing so would only undermine the goal of SMM, as materials that are or could be reclaimed for reuse under the current exclusion would instead have to be incinerated at offsite facilities and replaced by virgin product.

In several locations, the preamble says that "[t]he purpose of these proposed revisions is to ensure that the recycling regulations, as implemented, encourage reclamation in a way that does not result in increased risk to human health and the environment from discarded secondary material." (44094, 44095) In its introductory SMM discussion, however, EPA concludes: "[T]o the extent that the Agency can use today's proposal to help advance the[] goals [of SMM], while ensuring protection of human health and the environment, EPA believes that it makes sense to do so." (44103) In the final rule, EPA should clearly articulate that one, if not the overriding, goal of the rule is to implement the concept of SMM, including avoiding unintended consequences of regulation.

II. SOCMA Endorses the Proposed Remanufacturing Exclusion

A. The Proposed Remanufacturing Exclusion Effectuates SMM

The Agency explicitly links its proposed remanufacturing exclusion to its new emphasis on SMM: "The goal of the remanufacturing exclusion would be to encourage sustainable materials management by identifying specific types of waste of transfers of hazardous secondary materials to third parties that, under appropriate conditions, do not involve discard and can result in extending the useful life of a commercial-grade chemical." (44132) After explaining the many benefits of sustainable materials management, EPA continues, "[i]n particular, when hazardous secondary materials can be kept in the manufacturing process, rather than disposed of, or used in a lower-value process…substantial environmental benefits can be obtained." (Id.) As noted above, the proposed exclusion would serve this rule's goal of avoiding the unintended adverse environmental and energy consequences of regulating as wastes materials that can and will be reused as products.

SOCMA strongly supports the proposed new remanufacturing exclusion, and appreciates the Agency's effort to "recognize good business practices to increase recycling in a safe and appropriate manner."[8] We agree with EPA that "some specific types of hazardous secondary materials are more like valuable commodities than solid wastes," are accordingly managed in ways that are not indicative of discard, and thus are not properly within the scope of the statute. As the agency correctly notes, "the potential for discard in inter-company re-manufacturing

[8] http://www.epa.gov/waste/hazard/dsw/2011pr-faqs.htm

to those of the original commercial-grade materials."[12] However, SOCMA would urge EPA to go further. The 18 listed chemicals are not used exclusively, or even mainly, for their solvent properties – in many cases, they are used as reaction media, as chain link terminators in polymerization reactions, and even as ingredients. Along with the 18 listed chemicals, many others are used similarly and could also be remanufactured to commercial grade while offering comparable environmental and economic benefits and not increasing the risk of discard. EPA should therefore include *all* materials that are (i) used in reactors, extractors, purifiers, or blending equipment in pharmaceutical, organic chemical, or plastics and resins manufacturing and (ii) remanufactured and reused as high-value products.. At a minimum, SOCMA believes that EPA should add benzene, acetone, and isopropyl alcohol to its hazardous secondary material list. Each of these chemicals is widely used in the listed chemical functions within the listed industries. As with the 18 listed chemicals, these three chemicals typically become mixed with pure product ingredients that can readily be separated from them, allowing the reuse of both.

D. SOCMA Supports the Proposed Petition Process

We were also encouraged to see that EPA is considering adding a specific petition process through which petitioners could apply to EPA to request that another hazardous secondary material, industry sector or functional use be added to the exclusion. SOCMA urges the Agency to add such a process. Particularly to the extent that the final rule does not expand the list of chemicals eligible for the exclusion, there is no doubt that, as people become familiar with the rule, and as material usages and new applications arise, they will call for similarly valuable solvents – and other materials -- to be exempted.

A petition process, similar to that of the one detailed in Section XI.D of the preamble, would be critical to ensuring that this exclusion could provide as many environmental and economic benefits as possible. It is worth adding that such a petition process would not increase the risk of discard since, in order to be successful, a petitioner would have to satisfy the Administrator that the proposed addition would not do so.

E. Conditions of the Exclusion

SOCMA believes that the basic notification, recordkeeping, and storage accumulation requirements are all reasonable as currently written. We particularly support the notion that the recordkeeping requirements could be satisfied by routine business records. We also believe that compliance with the RCRA tank and container standards and air emission requirements for such units is feasible. However:

- We vehemently oppose the notion of requiring financial assurance for remanufacturers. By definition, these facilities are remanufacturing these products to lower their own costs and to increase their revenues. They have no incentive to mishandle these materials. This requirement would ensure that only a few huge companies, and possibly no one, would find this exclusion financially worthwhile.

[12] Preamble, p.44134

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noted in the proposal, "EPA has not received any information that would cause the Agency to reverse this determination." (Id.) EPA thus has no reasonable basis to eliminate or limit the exclusion. *See Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 43 U.S. 29, 43, 46-57 (1983).

We particularly disagree with the newly proposed idea of making notification a condition of the exclusion. As EPA explains in the preamble, "notification, in and of itself, d[oes] not allow regulatory authorities to directly determine that hazardous secondary materials were discarded." (44116) A generator either has reclaimed secondary materials under its control or it hasn't. If it has, those materials were never discarded. If it hasn't – for example, because they were spilled and not cleaned up – the materials have been discarded, and the exclusion has been lost. Notification (or not) does not bear on either outcome. EPA therefore cannot make notification a jurisdictional element of the exclusion – which is the legal effect of making it a condition of the exclusion

EPA's principal reasons for making notification a condition of the exclusion do not justify that action:

- EPA is concerned that facilities will otherwise not take the requirement seriously, but regard it as a "paperwork violation." (44115) In point of fact, notification *is* a paperwork requirement. These requirements can play important roles in regulatory systems, but the appropriate way to make facilities take them seriously is to penalize paperwork violations sufficiently to get their attention. Taking away the benefit of the exclusion is not merely a penalty, however, but a legal conclusion – and one that is not warranted for the reasons explained above. Moreover, we do not understand how making nonnotification jurisdictional "leav[es] flexibility to tailor enforcement in appropriate cases." (44116) If notification is a condition of the exclusion, failure to notify voids the exclusion and the reclamation was hazardous waste management. Agencies would have no discretion to alter this conclusion.

- Failure to notify "could indicate that the hazardous secondary material may be mismanaged," either because the facility is unaware of the exclusion's requirements or intended to evade it. (44115-16) This may be true – but it does not explain why the requirement should be jurisdictional. Evasion should be punished, but by penalties, not by imposing RCRA jurisdiction where it does not exist.

As we explained at the June 2009 public meeting and in our August 2009 written comments, the "thermonuclear" consequences of inadvertently violating the notification requirement, if it were a condition of the exclusion, would be far out of proportion to the purposes served by the requirement. The available of civil and criminal penalties for failure to notify is sufficient to assure compliance.

We do not oppose the proposed definition of "contained," which seems to codify the conventional understanding of this concept. We particularly support, and appreciate, EPA's reasonable and realistic discussions of when failures of containment would constitute discard and when they would not (44113, 44114). As EPA explains there, "small releases from normal

> Concerning the tolling arrangements, we also believe that the type of tolling contract in the specialty batch chemical industry does not constitute discard as long as the recycling is legitimate and the hazardous secondary material is not speculatively accumulated... Under this scenario, the hazardous secondary material continues to be managed as a valuable product, so discard has not occurred.[13]

In the final 2008 rule, EPA went on to include a toll manufacturing exemption as part of the "under the control of the generator" exclusion as long as the tolling contractor "retains ownership of, and responsibility for, the recyclable material that is generated during the course of the production of the product" pursuant to a written contract between the tolling contractor and batch manufacturer and reclaimed by the contractor.

This concept of ownership and responsibility for the recyclable material has not changed since the rule was finalized in October 2008– indeed, it remains the essence of the relationship between the tolling contractor and manufacturer. Thus, it is puzzling why EPA would even raise the issue for possible discussion.

The Agency raises the prospect that the tolling exclusion "possibly add[s] some additional risks of discard" because "[t]he definitions under this exclusion (with its attendant certifications) are complicated and involve applying the exemption to companies other than the original generators and relying on contractual commitments to ensure generator control." But these definitions, of course, are no different – and no more complicated – than they were when EPA first promulgated the rule. And no evidence has emerged since then to support this speculation.

2. The "Utilization Rate" is a Misleading and Inappropriate Metric for Measuring the Value of the Provision

EPA wonders if interested parties would be better off if the exclusion were revoked in part because it has only been "infrequently utilized." The agency neglects to note, however, that EPA itself is the reason the exclusion has been not been used more widely. Citing the utilization rate as a basis for rescinding the exemption is like tying someone's arms behind their back and then faulting them for not putting up a fight.

The rule has been enveloped in uncertainty ever since it was finalized in the fall of 2008 -- uncertainty linked to the agency's back and forth with the Sierra Club, the public debate of whether or not to reopen the rule, and the extended environmental justice discussion, from the drafting of an analysis methodology to the completion of that analysis. Is it any wonder that no more than a couple of states have adopted the rule of their own accord? The large majority of SOCMA members cannot take advantage of the exemption, even if they wanted to, because they or their counterparties (or their shipment routes) are in states that have not adopted the rule yet.[14]

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[13] 72 Fed. Reg. at 14185.

[14] EPA itself acknowledges this fact. In its June 30, 2011 Memorandum, *EPA's Evaluation of Data Collected from Notifications Submitted under the 2008 Definition of Solid Waste*

Suffice it to say, nothing has changed in this regard in the four intervening years since we submitted those comments. If anything, as the manufacturing sector in the United States has been increasingly battered in recent years, toll manufacturing arrangements are more critical to our membership than ever.

C. SOCMA Opposes EPA's Suggested Alternative to the Tolling Exclusion

EPA also solicits comment on making tolling arrangements eligible for the proposed alternative hazardous waste regulations for hazardous recyclable materials transferred to a third party for reclamation. EPA writes that, "[i]f this approach were finalized, there would be no need for definitions and certifications that are specific to tolling arrangements." SOCMA strongly opposes this alternative.

1. The Tolling Provision is Not Equivalent to The Transfer-Based Exclusion, and Should Not be Associated with the Same Perceived Risks

In the section of the preamble just referenced, the Agency neglects to mention it was proposing the alternative hazardous waste regulations for materials transferred to a third party for reclamation **specifically because** it believed that, "absent specific conditions," transfers of these materials to "third party reclaimers generally involve discard and (2) the conditions . . . [h]ave serious gaps that could create a potentially unacceptable likelihood of adverse effects to human health and the environment." As noted above, EPA has repeatedly stated that tolling arrangements under the control of the generator do not involve discard and do not pose an "unacceptable likelihood of adverse effects to human health and the environment." Put plainly, EPA's own language in the rulemaking record over the last few years confirms that the toll manufacturing exclusion does not involve the same circumstances as offsite waste management, and accordingly does not present the same risks that EPA uses to justify the restrictive nature of latter exclusion.

2. The Suggested Alternative is A Solution to a Nonexistent Problem

In seeking comment on relegating tolling arrangements to a form of Subtitle C regulation, the agency does not primarily cite the perceived risk of discard resulting from the tolling exclusion or "serious gaps" in the conditions of the final rule which could create "a potentially unacceptable likelihood of adverse effects to human health and the environment from such discarded material." Rather, as previously noted, EPA suggests that this new alternative might be justifiable "if the exclusion is going to only infrequently utilized." But again, as we argued earlier, this is a circular argument. With the regulatory uncertainty surrounding the rule over the last few years discouraging all but a handful of states from adopting it, EPA itself is at least somewhat to blame for an infrequent utilization rate. Participants in tolling arrangements cannot utilize an exclusion in a rule that has not been adopted in all of the states in which they and their transportation routes are located. In any case, why is the question of how frequently the exclusion utilized relevant at all to whether the exclusion should be retained? There is no cost to anyone of language being retained in the Code of Federal Regulations.

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materials, impurities that have absolutely no effect on the product's suitability for use as, for example, an ingredient in another process, and that pose no realistic risk to health or the environment. Even if such impurities were rare in the recycled product, or present at very low levels in the virgin product – so that the secondary material might theoretically pass Factor 4, there are literally hundreds of Appendix VIII constituents, and the cost of having to run scans for all or some subset of them with any regularity could easily destroy any value of a recycling process. As was amply documented in the comparable fuels rulemakings, the fact of analytic variability and the laws of statistics require that constituent levels be maintained substantially below applicable thresholds in order for a facility to have a high level of confidence that it will consistently pass the test for all constituents. The net effect of the newly proposed changes will be not only to roll back recycling efforts that were encouraged by the 2008 rule, but also to substantially undermine recycling as it has been practiced since the dawn of RCRA.

A. The Final Rule Extends the Legitimacy Criteria, Especially Factor Four, Far Beyond Their Intended Purpose

SOCMA is gravely concerned that the legitimacy criteria generally, and Factor 4 in particular, have drifted far beyond their original purpose and have taken on lives of their own that have little connection to that purpose. The decision that EPA cites in the preamble for the proposition that "materials undergoing sham recycling are discarded and, consequently, are solid wastes under RCRA," is instructive regarding what sorts of activities the courts have understood to constitute sham recycling. The "*API II*" decision clearly explains that "sham recycling" involves "the improper disposal of waste materials through adulteration."[18] Citing the *Marine Shale* case, the decision explains that, "[s]imply put, if extra materials are added to petrochemical recovered oil that provide no benefit to the industrial process, EPA finds this to be an act of discard under the guise of recycling."[19] To the extent this decision authorizes a comparability factor, it does so only to the extent that the presence of constituents not found in virgin products is an indication of adulteration. Indeed, the court made clear that whether EPA can "incidentally regulate oil containing chemicals not caused by sham recycling (and thus not discarded) . . . is beyond the claim we consider today."[20] The court did not uphold the notion that the presence of constituents in a material is conclusive of sham recycling – which is the effect of making Factor 4 mandatory. The court did not even hold that constituents found in secondary materials but not in virgin product are inherently "discarded"; indeed, it implied otherwise, unless they got there via adulteration.

The most recent case cited by EPA, *Safe Food and Fertilizer*,[21] similarly does not support making Factor 4 mandatory. This case, which like *API II* did not involve the legitimacy criteria per se, held only that EPA was within its RCRA authority to provide that fertilizers made from

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[18] *American Petroleum Institute v. EPA*, 216 F.3d 50, 58 (D.C. Cir. 2000).

[19] *Id.*, citing *United States v. Marine Shale Processors*, 81 F.3d 1361, 1365 (5th Cir. 1996).

[20] *Id.* at 59.

[21] *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003).

As a result, the proposal to mandate Factor 4 goes far beyond what the case law supports.

Mandating Factor 4 also represents an unprecedented extension of the legitimacy criteria themselves. These criteria were originally developed as a sort of screening test to help EPA gauge whether an asserted instance of recycling was a sham; i.e., in reality, disposal masquerading as recycling. The seminal "Lowrance Memo" clearly stated that its attachment was "a list of criteria that should be considered in evaluating the recycling scheme."[26] The attachment in turn consistently noted that "there may be no clear-cut answers to the question of whether a specific activity is . . . excluded recycling (and, by extension, that a secondary material is not a waste, but rather a raw material or effective substitute). . . . [B]ut, taken as a whole, the answers to these questions should help draw the distinction between recycling and sham recycling."[27] The original intent, as recognized by the preamble, was that in cases where one or more legitimacy factors was violated, one "should look more closely at the factors to determine the overall legitimacy of the process." (44124) The Lowrance Memo itself actually militates against EPA's new notion that, suddenly, Factors 3 and 4 should operate as bright line, jurisdictional tests for discard.

Finally, the Agency contends that it "is striving for consistency and cohesiveness" and cites its recent Nonhazardous Secondary Materials (NHSM) final rule[28] as justification for making all four factors mandatory. In the very next sentence of the preamble, however, EPA acknowledges "the differences in circumstances covered by that rule and this proposed rule" – most notably, the fact that two different regulatory definitions of "solid waste" are at issue. There is no need for consistency when the circumstances of the two rules are so very different. And the Agency has now announced that it "will initiate rulemaking proceedings to revise the NHSM rule," and will propose "[a] process . . . based on a balancing of legitimacy criteria and such other relevant factors as the Administrator may identify."[29] Thus, the four legitimacy criteria evidently are not going to be mandatory under a revised NHSM rule, and that rule ceases to be persuasive precedent for what EPA has proposed here.

The preamble does at one point set out the consideration that EPA should focus on in "[e]valuating the significance of levels of hazardous constituents in products of the recycling process" in this rulemaking: "whether or not the elevated levels of hazardous constituents compromise the efficacy of the product." (44119) This consideration is especially relevant in the circumstances of industrial and commercial manufacturing, where ingredients must satisfy

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[26] Memorandum from Sylvia Lowrance regarding "F006 Recycling" (April 26, 1989) at 3, available at http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/9F219844C3887C378525670F006BDE79/$file/11426.pdf

[27] Id., Attachment at 4.

[28] 76 Fed. Reg. 15456 (March 21, 2011)

[29] Letter from Administrator Lisa Jackson to Senator Ron Wyden (Oct. 14, 2011).

agency's original conclusion that its approach in the final rule "is clearer than the existing guidance, yet retains enough flexibility to account for the variety of legitimate hazardous secondary materials recycling practices that exist today."[31]

Under the new proposal, hundreds of materials, not just solvents, but acids, bases, and other basic chemicals that have been recycled under 40 C.F.R. § 261.2(e) would now be subject to the legitimacy factors, and many will fail factor 3 or 4. As EPA requested, SOCMA presents "specific information on numerous cases where the product of hazardous secondary material recycling ha[s] levels of hazardous constituents that [a]re not comparable to those found in products made from raw materials." (44124) As these examples show, it is not the case that "the products of solvents recovery, metals recovery, and acid regeneration are generally indistinguishable from products made from raw materials." (Id.) These examples also show the dismaying extent to which the requirement to comply with Factor 4 would have the unintended consequences of foiling much environmentally-beneficial recycling – thus frustrating sustainable materials management.

- **Example 1.** One SOCMA member company uses benzene as a reaction medium and molecular chain length terminator in polymer production. After such use, this benzene is still 93 to 97% pure solvent, colorless and clear. The three to seven percent impurities are a mixture of inerts and other solvents, including less than 1% of an Appendix VIII solvent not typically found in the virgin material. This benzene is currently being sold to another specialty chemical manufacturer that uses it as a feedstock in its process to make ethylbenzene, which in turn is dehydrogenated to make styrene, which is used in the manufacture of synthetic rubber and plastics. Our member company sells approximately 300,000 pounds of benzene each year for this purpose. The recycling effort would be in jeopardy under the proposed rule, as it would likely fail Factor 4.

- **Example 2.** The problem with mandating Factor 4 is not limited to solvents. One member company produces a costly monomer at its plant for use by a toller as a feedstock in polymer production. This particular process requires the input of excess monomer to drive the reaction to completion. Our member company currently has a RCRA variance from the state regulatory agency to allow return of the excess monomer to the original production plant for reclamation. The monomer being reclaimed contains an Appendix VIII solvent not found in the virgin monomer, but which is one of the other valuable ingredients in the process. In a double recycling process, the member company removes only the unwanted contaminates and return the reclaimed monomer, *plus* the valuable Appendix VIII solvent, to the toller, thus enabling the toller to reduce the amount of the Appendix VIII solvent it has to add to the batch. This particularly sustainable effort would likely fail Factor 4, resulting in the disposal of over 1,600,000 pounds a year of valuable product annually. In this case, because the product is a reactive monomer, it could not be fuel-blended and would have to be incinerated without even the benefit of energy recovery.

[31] 73 Fed. Reg. 64744

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VI. Technical Corrections

SOCMA has noted several apparently unintended errors that we identify here so that EPA can fix them in the final rule:

1. Page 44152; proposed § 261.4(a)(23)(i)((B): The certification language repeated here from the original definition of "under control of the generator" (§ 260.10) accidently omits the scenario of two facilities under common control. It says the generator must provide "one of the following certifications," but then only supplies one certification. The portion that currently reads ". . . material". For . . ." should read as follows:

. . . material," or "on behalf of [insert generator facility name] I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], that both facilities are under common control, and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material." For . . .

2. Page 44152; proposed § 261.4(a)(23)(ii)(B): The third sentence of this clause is missing several words: "Hazardous secondary material managed in a unit with leaks or other continuing ***or intermittent unpermitted*** releases . . . ."

3. Page 44153; proposed § 266.30(a): The reference to "§ 261.1(a)(4)" should be to § 261.1(*c*)(4). The former does not exist. In the second sentence of that same subsection, the second use of "this" should be "that" (i.e., "that is being recycled.").

VII. Conclusion

As the debate over the DSW rule has continued over the last several years, SOCMA recognized early on that in order "for this proposal to become effective, authorized states must act to adopt the rule..." The importance of uniform adoption by the states was clear to SOCMA's membership. As we wrote in 2007, "[g]iven the small volumes involved in most of these [toll manufacturing] recycling opportunities, the burden of trying to evaluate multiple state programs for interstate shipment and recycling, coupled with the significant liability risks of inadvertently not complying with additional state-specific requirements, can deter SOCMA members from pursuing these recycling opportunities. Uniform adoption by the states of the EPA exemptions," we concluded, "will best serve the common goal of promoting additional resource recovery and recycling." Suffice it to say that the fact that only a handful of states have adopted the rule as of October 2011, three full years after the rule was finalized, greatly limits the rule's effectiveness at promoting this goal of sustainable materials management.

SOCMA strongly supports some of the new provisions in the new proposal, particularly the proposed new remanufacturing exclusion. And we were pleased to note the retention of the under the control of the generator and tolling exclusions. However, as much as we desire the regulatory uncertainty which has surrounded this rule for the last several years to end, we are concerned that some of the new provisions in the proposal will serve to undermine some of the

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February 21, 2014

SOCMA and the Definition of Solid Waste Rule – Addendum to December 2013 Backgrounder

Focus: Legitimacy Criterion #4

The Society of Chemical Manufacturers and Affiliates ("SOCMA") previously submitted extensive comments to the U.S. Environmental Protection Agency ("EPA") on the Agency's 2011 proposal to revise the definition of solid waste under the Resource Conservation and Recovery Act ("RCRA"),[1] and it is our expectation that EPA will issue a final rule in the near future. We sincerely hope that EPA will promulgate the final rule along the lines of SOCMA's comments.[2] In particular, we certainly hope that EPA will not make Legitimacy Criteria ##3 and 4 mandatory as proposed. We continue to vigorously oppose that move for the reasons explained in our earlier comments.[3]

The purpose of this letter is to focus on one provision of the proposed rule that we believe could potentially be interpreted in a way counter to EPA's intent and to the cause of environmental protection, and thus should be amended even if the Agency decides to finalize the Legitimacy Criteria requirement as proposed. The provision at issue is EPA's articulation of Legitimacy Criterion #4 in proposed 40 C.F.R. § 260.43(a)(4). Under that provision, the product of a legitimate recycling process "[m]ust contain concentrations of any [Appendix VIII] hazardous constituents ... at levels that are comparable to or lower than those found in analogous products."

SOCMA believes that this proposed formulation of Legitimacy Criterion #4, as well as the manner in which it would be applied under the proposal, are inappropriate and unlawful for all the reasons set forth in our earlier comments. We are also concerned that this language could potentially be interpreted in a way that EPA does not intend and that would unduly inhibit existing and future legitimate recycling without providing discernible environmental benefits. This is not an issue addressed in our comments, and so we flag it here.

In at least one of our members' cases, *more than one* product of a legitimate recycling process is returned to a production process - either the original one or a different one - as a partial or complete substitute for two (or more) ingredients in that production process. Put another way, the reclaimed products emerging from these legitimate recycling processes contain two (or more) chemicals that are useful for the production process in which the reclaimed products will be used. The heart of our concern is that an implementing agency (e.g., a state or EPA regional office) might view only one of those ingredients as the "analogous product" (since the combination would not ordinarily be available commercially), in which case it might then view the other ingredient as a constituent - in many instances an Appendix VIII hazardous constituent - not found in the analogous product.

That would (or could) lead to a conclusion that the second ingredient is a "toxic along for the ride," such that the recycling process might be deemed illegitimate. However, in circumstances where the second ingredient is *also* a useful ingredient in the production process, it is clearly not being discarded (especially where the amount of that second ingredient in the reclaimed product is comparable to or less than the amount of that ingredient when it is introduced in virgin form in the original production process). Rather than being "along for the ride," it also provides critical material values for the production process. Classifying the recycling process as a sham in this case would clearly be unjustified and would discourage environmentally beneficial recycling and conservation of material resources. We do not think this is the result that EPA intends, but are concerned that the language, as proposed, could be misinterpreted and misapplied in this way.

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[1] 76 Fed. Reg. 44094 (July 22, 2011).

[2] Letter from Daniel Moss, Senior Manager, Government Relations, SOCMA, to OSWER Docket (October 20, 2011).

[3] *See id.* at 14-20.